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IN THE

Supreme Court of the United States

October Term, 1967

No. 360

HOFF RESEARCH & DEVELOPMENT LABORATORIES, INC.,

Petitioner,

vs.

PHILIPPINE NATIONAL BANK and PHILIPPINE NATIONAL BANK, New York Agency,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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The Opinion Below

The opinion of the Supreme Court of the State of New York, County of New York, was unofficially published in the New York Law Journal, dated March 3, 1966.

The affirmance of the order of the Supreme Court, New York County, by the Appellate Division of the Supreme Court, First Judicial Department, was reported without opinion in 26 App. Div. 2d 992.

The denial by said Appellate Division of petitioner's motion for reargument or, in the alternative, for leave to appeal to the Court of Appeals of the State of New York, was not reported.

The denial by the Court of Appeals of petitioner's motion for leave to appeal to such Court from the order of affirmance of the said Appellate Division is reported in 19 N. Y. 2d 582.

Jurisdiction

The final order of the Court of Appeals of the State of New York was made on April 18, 1967.

No application has been made for an order extending the time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under Rule 19 of the Revised Rules of the Supreme Court and Title 28 U. S. C., sections 2101 (c) and 2104, on the ground that review by the Supreme Court of the United States by writ of certiorari is sought of an order and judgment entered after the denial of due process of law guaranteed under the Constitution of the United States.

Question Presented

Is the due process clause of the Fourteenth Amendment of the United States Constitution violated when the Court below properly grants summary judgment dismissing petitioner's complaint based on the following findings of fact:

(1) That petitioner failed to comply with the terms of two letters of credit opened by respondent bank causing the first letter of credit to expire and the second letter of credit to become inoperative, and

(2) That there is nothing in the record which would bind respondent bank to honor these letters of credit?

Statement

Clep Cement Corporation of Manila in 1961 was desirous of erecting a cement plant in the Philippines and engaged the services of Hoff Research & Development Laboratories, Inc., the petitioner herein, to construct this cement plant. It was necessary to obtain bank financing for this project and after negotiations with several financing institutions, Clep Cement Corporation arranged with the respondent bank for the opening of two letters of credit in favor of petitioner for the purchase of equipment to be used in the construction of the cement plant. These two letters of credit were opened through the Philippine National Bank Agency in New York upon instructions of the Philippine National Bank, Manila, Philippines, the respondents herein (15-21).

The first letter of credit L/C 613369 in favor of petitioner dated September 5, 1961 was subject to the following express conditions prior to negotiation:

(1) That $900,000.00 had to be deposited in the Philippine National Bank for credit to the account of Clep Cement Corporation *under the disposition of Philippine National Bank,* Manila only (15); and

(2) That this credit expired on Oetober 5, 1961 (16).

The second letter of credit L/C 613370 in favor of petitioner dated September 5, 1961 was subject to the following condition:

(1) That negotiations under this letter of credit by petitioner could *only* be made if the $900,000.00 was deposited as required by the first letter of credit L/C 613369 (20).

Petitioner was unable to secure this required deposit of $900,000.00 by October 5, 1961, the expiration date of L/C 613369, and this letter of credit was extended to November 4, 1961.

On November 1, 1961, petitioner and Clep Cement Corporation requested The Chartered Bank, New York City Branch to make the required deposit of $900,000.00 under the first letter of credit and to confirm the second letter of credit (25-27). Petitioner informed respondent of certain details of the transaction (61-62).

By *written agreement* dated November 3, 1961, *Petitioner,* Respondent Philippine National Bank, The Chartered Bank and Clep Cement Corporation contracted that Chartered Bank would deposit $900,000.00 under the first letter of credit *on the express condition* that this conditional deposit would not become firm until Clep Cement Corporation made certain peso deposits in branches of Chartered and Bank of America in Manila by December 4, 1961 (28-32). When petitioner and Clep Cement Corporation failed to make the required peso deposits by December 4, 1961 in accordance with the terms of the written agreement of November 3, 1961, the Chartered Bank was refunded its conditional deposit and the first letter of credit L/C 613369 expired (32-33).

Thereafter petitioner endeavored unsuccessfully to interest other banks in financing this transaction, and failed to negotiate the reestablishment of the expired letter of credit with the Philippine National Bank, respondent herein.

The Supreme Court, New York County found that the material, basic and operative facts were not disputed, that the first letter of credit did not become operative and expired, that the second letter of credit never became operative, and that there was nothing in the record which bound respondents to honor the letters of credit (84).

ARGUMENT

1. The sufficiency of the evidence to support the factual findings made by the Court below obviously presents no question warranting review.

The record shows clearly that the only deposit of $900,000.00 made in connection with the first letter of credit L/C 613369 was the conditional deposit of $900,000.00 made by the Chartered Bank with respondent bank per the *written agreement of November 3, 1961 between petitioner,* Clep Cement Corporation, respondent bank and the Chartered Bank (25-32). Petitioner alleges no other deposit of $900,000.00. Not having made a firm deposit of $900,000.00 as required by the terms of L/C 613369 *which caused this letter of credit to expire,* petitioner cannot complain that the respondent bank did not honor this letter of credit. A new letter of credit would have to be renegotiated by all parties herein including the Clep Cement Corporation to reestablish this transaction and this was not accomplished. It is clear from the record that petitioner and the Clep Cement Corporation failed to honor their *written commitment* to the Chartered Bank dated November 3, 1961 to make peso time deposits in the Manila branches of the Chartered Bank and the Bank of America (32-33), and as provided in the written agreements of November 3, 1961 (25-32), the conditional deposit of $900,000.00 was returned to the Chartered Bank resulting in the expiration of letter of credit L/C 613369.

The second letter of credit L/C 613370 had a provision that no negotiation could take place under this second letter of credit until the $900,000.00 firm deposit was made in respondent bank as required under the first letter of credit L/C 613369 (20). Since the second letter of credit L/C 613370 could not be negotiated unless this firm deposit of $900,000.00 was made, this second letter of credit became inoperative and of no effect when the deposit of

$900,000.00 was not made and the first letter of credit L/C 613369 expired.

As a result of petitioner's failure to comply with the terms of the two letters of credit, in that a firm deposit of $900,000.00 was not made under L/C 613369, the Court below properly found that L/C 613369 expired and L/C 613370 became inoperative.

Petitioner's statements as to its financial arrangements with the Nederlandsche Handel-Maatschappij are irrelevant in that petitioner and respondent agreed in writing to the substitution of The Chartered Bank for Nederlandsche, thus eliminating Nederlandsche from the picture (28-29). In any event the most that can be said for Nederlandsche is that it forwarded a proposal to respondent in behalf of petitioner prior to the letters of credit in issue which proposal was not acknowledged or accepted by respondent (37-38).

Petitioner's statements concerning confirmation by other banks of the second letter of credit L/C 613370 are irrelevant in that petitioner having failed to make the firm deposit of $900,000.00 under L/C 613369 was precluded by the terms of L/C 613370 from any negotiation under this L/C 613370 which would include confirmation by other banks (20).

Though irrelevant to the issue, petitioner endeavors by argument to change the permissive "may be confirmed" by other banks in L/C 613370 (20) into a mandatory requirement that respondent arrange to have the second letter of credit confirmed by other banks and that respondent bank for petitioner's benefit and contrary to normal banking practice place large compensating balances of respondent's funds on deposit with other banks to secure this confirmation. Petitioner recognized the permissive "may be confirmed" as authority from respondent to

petitioner to seek its own confirmation by other banks when it requested Chartered to confirm L/C 613370 and agreed to lodge compensating balances in Chartered and Bank of America branches in Manila (29-30), thus negating its own argument.

Petitioner's statement of its activities after L/C 613369 expired does not contain any matter which would establish any resurrection of L/C 613369 and points up petitioner's unsuccessful efforts to reestablish this transaction.

Notwithstanding the arguments and conjectures of petitioner (75-76-77) it is clear from the record and as found by the Courts below that L/C 613369 expired when petitioner failed to place compensating balances as agreed in branches of the Chartered Bank and Bank of America at Manila and as a consequence Chartered Bank was refunded its conditional deposit of $900,000.00 per written agreement of the parties herein. It is clear that the second letter of credit became inoperative when the firm deposit of $900,000.00 was not made as required under L/C 613369. In summary the most that can be said for petitioner is that after the expiration of L/C 613369 and after L/C 613370 became inoperative, petitioner attempted to reestablish the transaction through renegotiations with respondent and was unsuccessful.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

MATTHEW E. MCCARTHY,
Attorney for Respondents.

July 26, 1967